

Guaranty Agreement
between
NEW MEXICO ECONOMIC DEVELOPMENT DEPARTMENT
and

This Guaranty Agreement (the “Guaranty Agreement”), dated _____ (the “Effective Date”), is between the New Mexico Economic Development Department (NMEDD or Department) and _____,
a _____ (the “Lender”) whose address is _____.

RECITALS

A. The State of New Mexico is adjusting its business-loan guarantee programs in order to make capital more available to business owners whose operations are severely impacted by the COVID-19 health emergency.

B. The Department has created a program to assist businesses seeking emergency loans or lines of credit to deal with negative economic impacts from COVID-19. The Department can guarantee a loan or line of credit up to 80% of principal up to a maximum participation amount of \$50,000. Loan proceeds are flexible and can be used for (and not limited to) the following: working capital, inventory and payroll.

C. _____, is a New Mexico _____ and desires to obtain a loan to:

_____ (the “Project”).

D. The Department and the Lender desire to sign this Guaranty Agreement in furtherance of authorizing the pledge by the Department of the Guaranty (defined below) in favor of the Lender as described herein, and to further delineate the respective rights, duties and liabilities of the Parties in respect of the Guaranty.

NOW, THEREFORE, in consideration of the recitals and mutual agreements in this Guaranty Agreement, the Parties agree as follows:

Section 1. The Loan. Borrower is receiving the following Loan, defined below, from the Lender. Pursuant to the Loan Documents, the principal amount of the Loan is: _____ Dollars (\$_____) (the “Loan”, or the “Loan Limit”). The Loan is of the following type marked by an “X” below:

_____ Term Loan. A term loan (fixed amount with specified repayment schedule (the “Term Loan”)); or a
_____ Revolving Line of Credit. A revolving line of credit (open line of credit allowing for cycles of advances and repayment (the “Revolving Loan”).

The original Loan Documents shall be retained by the Lender, and copies of all Loan Documents shall be forwarded to the Department upon execution.

Section 2. Amount of Guaranty. The guaranty amount shall be _____ Dollars (\$_____).

Section 3. The Department's Guaranty of Loan. In consideration for Lender's compliance with the terms and conditions of this Agreement, the Department hereby guarantees and promises to pay, subject to the Guarantee Amount and other terms and conditions herein, the Guarantee Indebtedness related to the Loan for a term of 6 months (or may be extended up to 12 months) from the date of the Loan closing (the “Initial Term”). The extent of the security provided by the Guaranty is further limited, as marked by an “X”, below:

_____ For a Term Loan, the Guaranty secures the lesser of the original principal amount disbursed under the Term Loan (the “Term Loan Principal Balance”), and the outstanding Term Loan Principal Balance plus thirty (30) days accrued, unpaid interest, or;

_____ For a Revolving Loan, the Guaranty secures the Revolving Loan only up to an amount not to exceed the lesser of: (i) the Initial Deposit or (ii) _____ percent (_____%) of the outstanding principal amount of the Revolving Loan up to the Loan Limit plus thirty (30) days accrued, unpaid interest, and as further limited by any restrictions or reductions on further advances which reduce the Loan Limit as may be imposed by the Lender (the “Revolving Loan Principal Balance”).

Section 4. Termination. The Guaranty shall automatically terminate upon the first to occur of:

(a) Expiration of the Initial Term unless: i) this Guaranty Agreement is otherwise extended as provided hereunder; or ii) there is Borrower event of default and Lender has and continues to comply with the requirements of Section 14;

(b) Payment or credit in full of the amount equal to the applicable of the: (i) outstanding Term Loan Principal Balance or (ii) the then outstanding Revolving Loan Principal Balance after taking into account the then existing restrictions or reductions on further advances which are imposed by the Lender, and subject to the closure of that part of the Revolving Loan which equals the foregoing amount;

(c) An Event(s) of Default (as defined below) by the Lender;

(d) In the event of, and coincident with, the occurrence of an event

described in Section 14(b) (only to the extent to which there is a balance remaining after application of the Guaranty as provided by Section 14(b)).

Section 5. Administration of the Loan.

(a) The Lender shall provide the Department with copies of all financial statements provided by the Borrower to the Lender, and copies of all Loan Documents. Unless the Department specifically exempts one or more specific documents (under terms and conditions acceptable to the Department), the Lender shall provide the Department with any additional documents in its possession or control arising out of, or related to, the Loan or the Loan Documents.

(b) The Lender shall disclose to the Borrower and any co-maker, guarantor, endorser, other debtor or obligor of the Loan, the existence of this Guaranty Agreement in connection with the making and servicing of the Loan and collecting payments to be made by the Eligible Passive Borrower. The Lender shall exercise the same degree of care and discretion in servicing the Loan and collecting payments from the Borrower as it would take in servicing the Loan and collecting payments solely for its own account.

(c) The Lender may amend the terms and conditions of the Loan Documents providing written notice to the Department, provided however, the Lender may not, without the express prior written approval of the Department, by amendment or otherwise: (i) waive or release any claim against any Borrower or any co-maker, guarantor, endorser, other debtor or obligor of the Loan; or (ii) consent to any release, substitution, or exchange of collateral, except (a) sales of inventory in the ordinary course of business or (b) sales, substitution and exchange of worn or obsolete equipment in the ordinary course of business; or (iii) effectuate any of the circumstances in Section 4(b).

Section 6. Representations and Warranties of the Department. The Department represents and warrants that:

(a) The Department is a body corporate and a political subdivision of the State of New Mexico. The Department has the power to enter into and perform its obligations under this Guaranty Agreement;

(b) Except as disclosed in writing to the Lender or provided by law, no consent or approval is necessary from any other governmental department as a condition to the execution and delivery of this Guaranty Agreement by the Department or the performance of any of its obligations under this Guaranty Agreement;

Section 7. Representations and Warranties of the Lender. The Lender represents and warrants the terms and conditions set forth in Appendix A and further represents and warrants that:

(a) The only recipient of the Loan is the Borrower identified and described in this Guaranty Agreement;

(b) Lender shall set a fair and reasonable interest rate.

(c) Lender shall perform all of its obligations and duties and shall otherwise comply with all terms and conditions under the Loan Documents and this Guaranty Agreement;

(d) Lender has performed a credit analysis of the Borrower satisfactory to the Lender;

(e) Upon closing of the Loan, the Lender shall have good and marketable title to the Loan subject to no encumbrance or disability, and except as created by this Guaranty Agreement and the Loan Documents, to the actual or constructive knowledge of the Lender, no party to the Loan has any defense or claim against the Lender arising out of the Loan;

(f) The Loan shall be in accordance with applicable Federal and State laws, including but not limited to, laws governing types of loans, interest rates and priority of security;

(g) Lender has full power to enter into this Agreement and has taken all actions required by its procedures, by-laws and/or applicable laws to lawfully authorize its undersigned signatory to execute this Agreement and to bind Lender to its terms; and

(h) Lender shall not release its lien on any collateral securing the Loan without obtaining prior written approval from the Department.

Section 8. Additional Obligations of Lender. The Lender shall:

(a) Promptly notify the Department in writing (and describe in reasonable detail) of any:

(i) breach of warranty or any false or misleading representation or certification made by Lender under this Guaranty Agreement, whether now or in the future existing; and

(ii) any breach of warranty or any false or misleading representation or certification made by the Borrower in any of the Loan Documents, whether now or in the future existing; and

(b) Promptly notify the Department in writing of any of the following actions by or on behalf of the Lender (including providing copies to the Department of any notices or other documents from Lender arising therefrom):

(i) any acceleration of any payment under any of the Loan Documents;

(ii) the commencement of any collection proceeding with respect to the Loan against any Borrower or any co-maker, guarantor, endorser, debtor or other obligor of the Loan;

(iii) the seizure, sale, transfer, assignment, foreclosure, or attempt to exercise any of the foregoing against any collateral securing the Loan,

(iv) any forbearance or similar arrangements with respect to the Loan, or

(v) any written notice provided by Lender to the Borrower, any guarantor or other endorser with respect to the Loan.

Section 9. Default by the Borrower. Upon the occurrence of an event of default by the Borrower:

a) the Lender shall copy the Department with all notices to the Borrower, and further provide the Department written notice describing in reasonable detail the circumstances of the event of default; and

b) prior to the Lender's demand for payment from the Department pursuant to the Department's guarantee obligations to the Lender for the Loan, the Lender shall diligently pursue the collection of all amounts owed by the Borrower under the Loan Documents until such Enrolled Loan is brought current, collected in full, reduced to a judgment, settled, or upon the reasonable judgment of the Lender, other action is required.

c) Upon Lender submitting a request for payment in accordance with this Guaranty Agreement, Lender will receive payment within 30 days from Department.

Section 10. Subsequent Recovery by Lender.

(a) If, after application of all or part of the Guaranty against the Remaining Default Principal Balance, the Lender recovers from the Borrower any amount for which release of such Guaranty was made, the Lender shall promptly pay to the Department, for the Department's authorized use and application in accordance with Program requirements, an amount equal to such recovery, not to exceed the amount Lender received from the Guaranty. Notwithstanding anything to the contrary herein, Lender shall be required to make the foregoing payment solely to the extent that the amount recovered by Lender from the Borrower for a Loan, when added to the payments received by Lender under the Guaranty, exceeds Lender's loss on such Loan.

(b) For the purposes of this Section, the Lender's loss on a Loan shall not exceed the Remaining Default Principal Balance.

Section 11. Default by the Lender. The occurrence of any one or more of the following events or conditions shall constitute an ("Event(s) of Default") by the Lender under this Guaranty Agreement, unless a written waiver of the default is signed by the Department:

(a) Any representation or warranty made by the Lender under this Guaranty Agreement or any of the Loan Documents is incorrect in any material respect;

(b) Any material breach by the Lender of any duty or obligation of the Lender under this Guaranty Agreement which is not cured by the Lender to the satisfaction of the Department within thirty (30) calendar days after written notice thereof by the Department to the Lender;

(c) The appointment of a receiver or custodian over a material portion of the Lender's assets, which receiver or custodian is not discharged within sixty (60) calendar days of such appointment; or

(d) Any voluntary bankruptcy or insolvency proceedings are commenced by the Lender; or any involuntary bankruptcy or insolvency proceedings are commenced against the Lender, which proceedings are not set aside within sixty (60) calendar days from the date of institution thereof.

Upon the occurrence of any one or more of an Event(s) of Default by the Lender under this Guaranty Agreement, in addition to all rights and remedies created by this Guaranty Agreement, the Department shall be entitled to pursue and enforce all rights and remedies available, legal and equitable, including without limitation, the right of recoupment of all or any portion of the Guaranty amount which the Department has determined, in its sole discretion, was not used in accordance with the requirements of this Guaranty Agreement, and the right to require the Lender's books and records related to the Loan, Loan Documents and this Guaranty Agreement to be separately audited by an independent certified public accountant selected by the Department, at the Department's sole cost and expense. Provided however, in the event the audit reveals a breach of this Guaranty Agreement or the Loan Documents has occurred, the Lender shall reimburse the Department for the fees and expenses incurred to perform the audit.

No remedy is intended to be the sole and exclusive remedy in case any Event(s) of Default by the Lender under this Guaranty Agreement shall occur and each remedy shall be cumulative and in addition to every other provision or remedy now or later existing at law, in equity, by statute or otherwise. All remedies shall be cumulative. The Lender shall pay all costs and expenses, including, without limitation, reasonable attorney's fees and expenses incurred by the Department in enforcing any obligation of the Lender arising from or under the Loan, any of the Loan Documents, or this Guaranty Agreement.

Section 12. Notices. Any notice or other communication under this Guaranty Agreement shall be in writing and e-mailed, or faxed, or mailed by first class mail, postage prepaid, or sent by express, overnight courier to the respective Party at the address listed below, or such other address or e-mail account provided by the Parties, in accordance herewith, from time to time, and shall be deemed delivered one business day after the delivery or mailing date.

If to the Department: New Mexico Economic Development Department
1100 S. St. Francis Drive
Santa Fe, New Mexico 87505
Attn: Johanna Nelson
Email: Telephone: (505) 827-0264
Facsimile: (505) 827-0328

If to the Lender: _____

Attn: _____

Email: _____

Telephone: _____

Facsimile: _____

Section 13. Counterparts; Facsimile/Pdf Signatures. This Guaranty Agreement may be signed in counterparts and delivered electronically, by facsimile or by pdf, and in any such circumstances, shall be considered one document and an original for all purposes.

Section 14. Severability. All of the clauses of this Guaranty Agreement are distinct and severable and, if any clause shall be deemed illegal, void or unenforceable, it shall not affect the validity, legality or enforceability of any other clause or provision of this Guaranty Agreement.

Section 15. Captions. The captions or headings in this Guaranty Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Guaranty Agreement.

Section 16. Governing Law. This Guaranty Agreement is a contract made under the laws of the State of New Mexico, and for all purposes shall be governed by, and construed in accordance with, the laws of the State of New Mexico.

Section 17. Relationship between Parties. The Lender, and its officers, directors, agents and employees shall not describe or represent themselves as agents of the State of New Mexico, or the Department to any person, firm or entity for any purpose.

Section 18. Successors and Assigns. Except as otherwise provided by law, any rule of law or regulation, any Executive Order of the State of New Mexico, or separate agreement between the Department and the State of New Mexico, the Department may not pledge, subparticipate, assign, or otherwise transfer its rights, duties or obligations in this Guaranty Agreement without the express prior written approval of the Lender. The Lender may not pledge, sub-participate, assign or otherwise transfer its ownership interest in the Loan, or its rights, duties or obligations under this Guaranty Agreement or the Loan Documents, without the express prior written approval of the Department. This Guaranty Agreement shall bind the permitted successors and permitted assigns of the Parties.

Section 19. Waiver. A failure or delay in exercising any right under this Guaranty Agreement will not be presumed to operate as a waiver unless otherwise stated in this Guaranty Agreement, and a single or partial exercise of any right will not be presumed to preclude any subsequent or further exercise of that right or the exercise of any other right.

Section 20. Amendment. This Guaranty Agreement, and except as otherwise permitted in Section 7(c) of this Guaranty Agreement, the Loan Documents, may not be modified or amended without the express prior written approval of the Department, and no permitted modification or permitted amendment shall be binding except pursuant to a written instrument signed by the Parties sought to be bound.

Section 21. Effectiveness of Guaranty Agreement. The Department's obligations hereunder shall not become effective unless a copy of the Guaranty Agreement is returned to the

Department, signed by the respective authorized signatory of the Lender and Borrower by _____ **[30 days from date of issuance to Lender]** (the “Outside Closing Date”) and Lender closes the Loan with the Borrower within 15 business days of the Outside Closing Date;

In Witness Whereof, this Guaranty Agreement is entered into effective as the date first written above.

[NAME OF LENDER]

Title:

Date:

New Mexico Economic Development Department

Date:

[Name of Operating Entity]

Authorized Signer

Title:

Date:

APPENDIX A

LENDER ASSURANCES

Lender hereby makes the certifications listed below to the Department.

1. Eligibility Requirements.

(a) Lender is a bank, state-funded revolving loan fund, or Community Development Financial Institution as defined in section 103 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4702);

(b) The Lender has not made the Loan to increase the pool of funds that generates tax credits using the New Markets Tax Credit program; and

(c) Lender is in compliance with the requirements of the Right to Financial Privacy Act, 12 U.S.C § 3401, et. seq.), and 31 C.F.R. § 103.121, if applicable.

2. Auditor General, etc. To enable the Department and to ensure compliance with the terms of this Guaranty Agreement and the Act:

(a) The Lender shall permit the Department and State, and any member, employee or agent of the foregoing to visit the Lender and any other location where the books and records of the Lender are normally kept to inspect the books and records, including financial records and all other information and data, relevant to the terms of this Guaranty Agreement;

(b) The Lender shall cooperate with the Department and State, if contacted; and

(c) The Lender shall permit the Department and State, and any member, employee or agent of the foregoing to make copies or extracts from information and to discuss the affairs, finances and accounts of the Lender and Borrower related to the Loan Documents and this Guaranty Agreement.

3. Criminal and Civil Matters.

To the best of Lender's knowledge, neither Lender nor any of its affiliates, subsidiaries, officers, directors and any person who, directly or indirectly, holds a pecuniary interest in the Lender of 20% or more: (i) have any criminal convictions incident to the application for or performance of a state contract or subcontract, and (ii) have any criminal convictions or have been held liable in any civil proceeding that negatively reflects on the person's business integrity, including without limitation, based on a finding of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or violation of state or federal antitrust statutes.